

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

SHAVONDA BAILEY, as Next Friend of §
K.A., and P.A.; and VIVIAN LAMPKINS, §
As Next Friend of J.L. §

v. §

CITY OF SAN ANTONIO, TEXAS; §
NATHAN PRESTON, *Individually* §
VIDAL DIAZ, *Individually* §
MICHAEL FLETCHER, *Individually* §
FRANCISCO GALVAN, *Individually* §
MATTHEW FLORES, *Individually* §
AUBREY PLAUCHE, *Individually* §
MATTHEW QUINTANILLA, *Individually* §
ROBERT TAMEZ, *Individually*; and §
PAUL TRIGO, *Individually* §

CIVIL ACTION NO. 13-CV-700-FB

AFFIDAVIT OF J. ROD McCUTCHEON

STATE OF TEXAS §
COUNTY OF Cooke §

Before me the undersigned authority on this day personally appeared J. Rod McCutcheon, who being by me duly sworn, deposed as follows:

"My name is J. Rod McCutcheon. I am over the age of 18 and have never committed a felony. I am of sound mind and competent to make this affidavit.

I am a forensic toxicologist with Diplomate certification through the American Board of Forensic Toxicology since 1978. I worked for the Texas Department of Public Safety Headquarters Crime Laboratory for twenty years, serving as the supervisor of toxicology for ten years. I served thirteen years as the chief toxicologist for the Travis County Medical Examiner's Office in Austin, Texas, and seven years as the chief toxicologist for the Bexar County Medical Examiner's Office.

In my capacity as a forensic toxicologist at these institutions, I performed toxicological analyses on blood, urine and other biological specimens, taken from living and deceased patients, to determine the presence or absence of alcohol, licit and illicit drugs, and poisons. My duties have also required interpretation of the toxicological findings in relation to evaluating impairment of mental and physical abilities, as well as contribution to the cause of death. I have

testified as an expert witness in State and Federal jurisdictions on many occasions over the past forty years.

My opinions on this case are based on my education, knowledge, and experience, as well as a review of the following:

1. City of San Antonio EMS Patient Care Report;
2. Bexar County Medical Examiner's Office Reports;
3. Bexar County Forensic Science Center Drug Report;
4. Medical records for Pierre Abernathy produced by the Plaintiffs;
5. Statements of multiple San Antonio Police Department officers;
6. Taser download data for multiple devices;
7. Dash Cam video of police pursuit and scene activity;
8. Photos of scene and decedent, Mr. Abernathy;
9. Statements of Brenda Allen, Lee Griffin, Tiffany Allen, Gary Hovermale, Jajuan Williams, and Horton Howard;
10. Bexar County Sheriff's Office incident reports involving Pierre Abernathy;
11. Plaintiffs' First Amended Complaint;
12. Christus Santa Rosa Hospital records for Pierre Abernathy;
13. The expert report of Albert Ortiz; and,
14. The expert report of Dr. Vincent DiMaio.

The San Antonio Fire Department/EMS Report shows a call was received to respond to 10800 Deepwater Bay, a residential neighborhood, at 03:28 AM, on August 4, 2011. As medical personnel were tending to an injured officer, another officer requested help with the suspect in custody, Mr. Pierre Abernathy. Emergency medical care was initiated, and the patient was sent to Santa Rosa Hospital in Westover Hills by ambulance. Mr. Abernathy was pronounced dead, at the hospital, by Dr. Mario Fernandez at 4:36 AM, on August 4, 2011.

An autopsy was performed on the body of Mr. Abernathy on August 5, 2011, at 9:45 AM, by the Bexar County Medical Examiner's Office. The medical examiner's office found that Mr. Abernathy died as a result of the combined effects of intoxication with cocaine, a prolonged struggle, and a cardiomyopathy (an enlarged heart).

San Antonio Police Department investigative records indicate that their first contact with Mr. Abernathy in the early morning hours of August 4, 2011, was when Officer Galvan noticed a black SUV traveling eastbound in the westbound lane of La Cantera. The SUV driver was not speeding, but was weaving in and out of his lane. Officer Galvan activated his emergency lights and siren, but the vehicle would not stop. Officer Nathan Preston was given permission to become the primary pursuit vehicle in order to provide video of the chase. Mr. Abernathy refused to stop his vehicle, and was followed from IH-10, to Loop 410, to HY151, finally stopping at his mother's home on Deepwater Bay.

Multiple officers attempted to subdue Mr. Abernathy when he exited his vehicle. Officer Preston stated he was able to guide Mr. Abernathy to the ground and apply a handcuff to one wrist of Mr. Abernathy. Mr. Abernathy then pulled his cuffed hand to his chest and attempted to

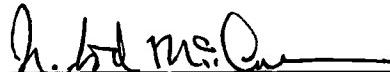
get up. Officer Preston then lost control of Mr. Abernathy. Over the next several minutes, multiple officers struggled to control Mr. Abernathy. Mr. Abernathy exhibited unusual strength, and was able to overcome multiple Tasers deployments before he was subdued. After he was handcuffed, Mr. Abernathy was moved from the flower bed to the grass. Officers Flores and Diaz stated that they stayed with the suspect. He continued to thrash his body violently, and then suddenly stopped fighting. Officer Diaz stated that Mr. Abernathy's breathing was loud at first, and then became quieter. Later, they noticed Mr. Abernathy had stopped breathing, and they requested help from EMS personnel on the scene.

The Bexar County Medical Examiner's Toxicology Report for Mr. Abernathy shows the perimortem blood sample taken from Mr. Abernathy, during medical treatment, contained cocaine at a concentration of 0.17 mg/L (milligrams per liter). Mr. Abernathy's postmortem blood contained benzoylecgonine, a cocaine metabolite, at a concentration greater than 0.50 mg/L. The cocaine finding in the blood of Mr. Abernathy means he was under the influence of cocaine during the time he was struggling with the police officers.

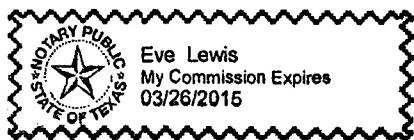
Cocaine is a central nervous system stimulant that causes increased blood pressure and increased heart rate. Cocaine is used recreationally for its desirable effects, which include euphoria, feeling of self-confidence and increased energy. Undesirable side effects may include paranoia, hallucinations, depression, and violent behavior. A toxic response to cocaine that can result in death, is commonly known as excited delirium. This syndrome typically includes elevated body temperature, agitation, delirium, and violent behavior. Death occurs minutes to hours after agitation and violent behavior ceases, and often occurs when the person is restrained.

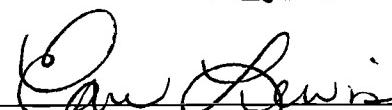
In my opinion, within reasonable toxicological probability, Mr. Abernathy was experiencing toxic effects of cocaine at the time of his death, and his use of cocaine was a contributing factor to his death.

Further affiant sayeth naught."


J. ROD McCUTCHEON

SUBSCRIBED TO AND SWORN before me on this the 20 day of November, 2014.




NOTARY PUBLIC in and for the
STATE OF Texas

CURRICULUM VITAE

J. Rod McCutcheon
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Lake Kiowa, Texas 76240

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EDUCATION

Bachelor of Science in Chemistry - 1970
University of Texas at Austin

CERTIFICATION

Diplomate - American Board of Forensic Toxicology (1978 to Present)

EMPLOYMENT

Chief Toxicologist – Bexar County Medical Examiner’s Office
October 1, 2004 to February 11, 2011

Chief Toxicologist - Travis County Medical Examiner’s Office
August 23, 1991, to September 10, 2004

Supervisor of Toxicology - Texas Department of Public Safety
May 1, 1980, to August 22, 1991

Chemist-Toxicologist - Texas Department of Public Safety
December 15, 1970, to May 1, 1980

PROFESSIONAL MEMBERSHIP

American Board of Forensic Toxicology
Current Status – Accreditation Committee Member

American Academy of Forensic Sciences
Current Status - Fellow
Offices Held - Toxicology Section Chair, 1989

Southwestern Association of Toxicologists
Current Status - Charter Member
Offices - President, 1985; Counselor, 1980-1982

Society of Forensic Toxicologist
Board of Directors – 2001 to 2003
Current Status - Member

National Safety Council
Current Status - Member, Drugs & Driving Division

Alcohol Testing Alliance
Current Status - Charter Member

The International Association of Forensic Toxicologists
Current Status – Member

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PUBLICATIONS

McCutcheon, J.R., "Reverse-Phase HPLC Determination of Thioridazine and Mesoridazine in Whole Blood," Journal of Analytical Toxicology, Vol. 3, 1979, pp. 105-107.

Eaton D.K., McCutcheon, J.R., "Matrix Modification For Furnace Atomic Absorption Spectrometric Determination of Arsenic in Whole Blood," Journal of Analytical Toxicology, Vol. 9, 1985, pp. 213-216.

McCord C.E., McCutcheon J.R., "Preliminary Evaluation of the Abbot TDx for Benzoylecgonine and Opiate Screening in Whole Blood," Journal of Analytical Toxicology, Vol. 12, 1988, pp. 295-297.

Cowan J.M., McCutcheon J.R., Weatherman A., "The Response of the Intoxilyzer 4011AS-A to a Number of Possible Interfering Substances," Journal of Forensic Sciences, Vol. 35, No. 4, 1990, pp. 797-812.

Cowan J.M., McCutcheon J.R., Weatherman A., "Correlation Between Results of Analysis of Simultaneously Collected Venus Blood and End-Expired Breath Specimens," Alcohol, Drugs, and Driving, Vol. 9, No. 1, 1993, pp. 19-25.

McCutcheon J.R., Woods P.G., "Snack Crackers Yield Opiate-Positive Urine," Clinical Chemistry, Vol. 41, No. 5, 1995, pp. 769-770.

Cowan J.M., Weatherman A., McCutcheon J.R., Oliver R.D., "Determination of Volume of Distribution for Ethanol in Male and Female Subjects," Journal of Analytical Toxicology, Vol. 20, 1996, pp. 287-290.

Zvosec D.L., Smith S.W., McCutcheon J.R., Spillane J., Hall B.J., Peacock E.A. "Adverse Events, Including Death, Associated With The Use of 1,4-Butanediol" New England Journal of Medicine, Vol. 344: 2001, pp. 87-94.

Sphieler V., Lacinda D., Kupiec T., McCutcheon J., Kemp P., "Screening Post-Mortem Whole Blood for Oxycodone by ELISA Response Ratio," J.of Forensic. Sciences, Vol. 49, No. 3, 2004, pp. 621-626.

Hargrove V.M., McCutcheon J.R., "Comparison of Drug concentrations Taken From Clamped and Unclamped Femoral Vessels," J. Anal. Toxicol. 32: 2008, pp. 621-625.

Molina D.K., McCutcheon JR and Rulon JJ Head Injuries, Pentobarbital and the Determination of Death, Am J Forensic Med Path 30(1): 75-77. 2009.

Essler S., Bruns K., Frontz M., McCutcheon J.R., A Rapid Quantitative Method of Carisoprodol and Meprobamate by Liquid Chromatography – Tandem Mass Spectrometry, Journal of Chromatography B, Vol. 908, pp. 155-160, 2012.

SELECTED PRESENTATIONS

Symposium - "Driving Under the Influence - Drugs Other Than Alcohol and Marijuana", Society of Forensic Toxicologists, St. Louis, MO, Fall 1984.

"Alprazolam Concentrations in Blood from Six DWI Suspects", American Academy of Forensic Sciences, Cincinnati, OH, 1989.

"Heroin Deaths – What's Happening in Austin", Southwestern Association of Toxicologists, Kansas City, KS, April 1996

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SELECTED PRESENTATIONS (continued)

“Dilution Effects of IV Fluids On Alcohol Concentrations”, Southwestern Association of Toxicologists, San Angelo, TX, Fall 1999.

“Fatal Intoxication Following Recreational Ingestion of 1,4-Butanediol”, American Academy of Forensic Sciences, Reno, NV, February 2000.

“Two Pediatric Overdose Deaths Involving Hydrocodone, Chlorpheniramine, Brompheniramine and Pseudoephedrine”, International Association of Forensic Toxicologists, Paris, France, August 2002.

“Practical Applications of LCMS in Routine Forensic Toxicology”, Society of Forensic Toxicology, Workshop Chair, October 2003.

“Improving Toxicology Reporting in Fatal Crashes”, American Academy of Forensic Sciences, February 2004.

“Morphine Concentrations in Comfort Care Patients”, Southwestern Association of Toxicologists, November 2004.

“Calcium Channel Blockers in the Elderly”, American Academy of Forensic Sciences, Workshop 2006.

“Methadone Overdose Concentrations”, Southwestern Association of Forensic Toxicologists, Little Rock, AK, Spring 2007.

“Time Distinct Blood Draws in DWI Investigations”, Alcohol Testing Alliance, June 2008.

“Synthetic Cannabinoids – An Overview”, California Association of Toxicologists, May 2011.

Selected Continuing Education

“Pharmacology of Alcohol”, A.W. Jones, Texas Department of Public Safety, February 1994.

“Postmortem Forensic Toxicology: Issues in Childhood Poisoning”, R. Middleberg, AAFT, February 1999.

“Effects of Alcohol on Driving Tasks”, Closed Course Driving Study, Texas A& M, College Station, April 2000.

“Pharmacology of Selected Cardiovascular Drugs”, S. Wong, SOFT, October 2000.

“Human Factors, Performance, and Transportation Safety – The Rest of the Story: Beyond Alcohol and Other Drug Impairment”, Workshop, AAFT, February 2005.

“Blood Alcohol Concentration Extrapolation”, Workshop, SOFT, October 2005.

“Interpretation of Toxicological Analysis in the Elderly”, Workshop, AAFT, February 2006.

“Blood Drug Levels and Impaired Driving”, Workshop, TIAFT, August 2007.

“Symposium on Special Topics in Forensic Toxicology – Impact of Pharmacokinetics and Pharmacodynamics”, Midwest Forensics Resource Center, Ames, IA, August 2008.

“Pharmacology for Toxicologists”, Workshop, California Association of Toxicologists, January 2009.